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NO. 83-1778

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHRIS ALLEN MONTGOMERY,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS
OF ALABAMA

BRIEF FOR RESPONDENT

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BEST AVAILABLE COPY

23 pp

(i)

QUESTION PRESENTED

1. Whether petitioner may raise for the first time in this court a federal question that was neither raised nor addressed by the courts below.
2. Whether the state appellate court's opinion regarding the state's 'habitual offender law and the Eighth Amendment is in conflict with the rulings of this Court or the United States Courts of Appeals.

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals is reported as:

Montgomery v. State,
446 So.2d 697
(Ala.Cr.App. 1983)

The order of the Alabama Supreme Court is reported as:

Montgomery v. State,
446 So.2d 697 (Ala. 1984)

JURISDICTION

Respondent is satisfied with petitioner's jurisdictional statement except that the decision of the Alabama Supreme Court denying the writ was rendered on March 2, 1984 (not 1983).

STATEMENT OF THE CASE

Respondent is satisfied with the petitioner's statement with the exception of the following observations and corrections:

Montgomery's first "Question Presented" concerns the use of a prior federal felony conviction to enhance his punishment for the robbery conviction appealed from. In his petition before this court, he argues that he was denied his right to Due Process of Law under the Constitution. We observe that this argument was not presented to the state courts below. Neither did any state court rule or opine on any such Constitutional issue. Although Montgomery admits as much in his "Statement of the Case and Facts," respondents will elaborate further on this problem in the Argument and Appendix sections of this brief.

Petitioner is seeking a review of a conviction for Robbery in the First Degree. As stated in the opinion of the state court of criminal appeals (pages 3-5 of the appendix to petitioner's brief), Montgomery and his two accomplices pointed pistols (Montgomery's was a "large, western-style revolver") at two victims during a "stick-up," bound them with tape, and robbed them of money and merchandise. During the police chase a few minutes later, accomplice Pugh exchanged gunfire with the authorities. In view of all of this, respondent disagrees with petitioner's conclusion that "there was no violence" (as asserted by petitioner at page 6 of his brief).

ARGUMENT

The petition should be denied for the following reasons:

I.

Montgomery's first asserted reason for the writ concerns the trial court's use of a prior federal court felony conviction to enhance his sentence under the habitual offender law. He complains that the sentencing court, in so noticing the prior felony, deprived him of "his due process rights under the Fifth Amendment to the Constitution. . ."

[Petitioner's argument on this issue appears as Section II of his Argument (pg. 15 of his brief).] This is the first time that Montgomery has complained about that felony on federal Constitu-tional grounds.

He did, in fact, raise questions about the propriety of the federal firearms conviction in the Court of

Criminal Appeals and in his petition for a writ of certiorari in the Alabama Supreme Court.

1. The issue presented to the state intermediate appellate court is recited in Appendix A to this brief. The entire argument on the same issue (drawn from his brief in that court) is quoted in Appendix B to this brief. The court's response to the argument appears in the opinion at pages 14-15 of Appendix A to petitioner's brief.

2. The issue raised in the state supreme court is quoted in Appendix C to this brief.

In every case, Montgomery based his argument on Rule 6(b)(3)(iv) of the Alabama Rules of Criminal Procedure and upon the opinion in Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982). Even in his argument in this court (see pp. 15-18 of his brief), petitioner grounds his

complaint upon state law. He has added the Fifth Amendment due process argument in an effort to justify Supreme Court review. This he cannot do. See Rules 17 and 21(h) of the Rules of the Supreme Court, 1980.

II.

Montgomery's second "Question Presented" (but argued first in his brief), is whether the Alabama Habitual Felony Offender Act (§13A-5-9 of the Code of Alabama, 1975) complies with this court's ruling in Solem v. Helm, ___ U.S. ___, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

Petitioner's brief was prepared prior to the publication of the opinion in Seritt v. Alabama, No. 82-7127 (11th Cir., May 3, 1984). The factual legal issues involved in that case are strikingly similar to those present here.

Seritt was a habeas corpus challenge to the Constitutionality (under the Eighth Amendment) of a sentence of life without parole pursuant to Alabama's Habitual Felony Offender Act.

As here, Seritt was convicted of first-degree robbery. He was sentenced to life without parole based upon evidence of four prior felony convictions, all for violations of the state's controlled substances act. Seritt, at Ms. Op. 2919. As here, Seritt grounded his right to relief upon Solem v. Helm, supra. The Eleventh Circuit responded as follows:

Seritt's reliance on Solem v. Helm, however, to support his assertion that his sentence is unconstitutionally disproportionate is misplaced.

The issued raised in Solem v. Helm, was the extremely narrow one of "whether the Eighth Amendment proscribes a life sentence without possibility of parole of a seventh nonviolent felony." Id. at ___, 103 S.Ct.

at 3004, 77 L.Ed.2d at 642.
[Emphasis added by the Seritt
court]

Solem is sharply distinguishable from this case. Since Seritt's most recent conviction was for first-degree robbery, a crime of violence, and the defendant in Solem was convicted of uttering a "no account" check for \$100, a nonviolent offense, the Solem case is factually different and therefore inapposite. Thus, in the face of different factual settings, Seritt's reliance on Solem is unavailing.

Seritt, at Ms. Op. 2922-2923

The Eleventh Circuit proceeded to examine the operation of the Alabama Habitual Offender Act in light of the criteria set out in Solem (at U.S. ___, 103 S.Ct. 3010, 77 L.Ed.2d 650) and in a factual setting virtually indistinguishable from that in the instant case. See, Seritt, at Ms. Op. 2923-2928. The court noted that:

Except for treason, it is apparent that Alabama has reserved as Class A felony classification only the most serious

of offenses and those involving the risk that a human life will be taken. . . . Furthermore, section 13A-5-9(c)(3) guarantees that no criminal will receive the sentence of life imprisonment without parole, as a habitual offender, unless he has been convicted of three prior felonies and then commits a life-endangering offense.

Id., Ms. Op. 2924

After this painstaking analysis, the Eleventh Circuit panel concluded that, under the facts there presented, "the eighth amendment does not proscribe a sentence of life imprisonment without parole for a three-times convicted felon who thereafter commits a violent, life-threatening felony." Id., at Ms. Op. 2928 (last paragraph)

CONCLUSION

Petitioner having presented no grounds for the grant of the writ sought, respondent respectfully submits that the petition should be denied.

Respectfully submitted,

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ALABAMA

THOMAS R. ALLISON
ASSISTANT ATTORNEY
GENERAL OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this
the _____ day of September, 1984, I served
three copies of the foregoing Brief and
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APPENDIX



APPENDIX A

Page 3 of the Appellant's (Petitioner's)
brief in the Court of Criminal
Appeals of Alabama:

ISSUES PRESENTED FOR REVIEW

1. Whether the mandatory sentence of
life imprisonment without parole provided
for in Code of Alabama, 1975,

§13A-5-9(c)(3) is a violation of the
Eighth Amendment of the Constitution.

Rummell v. Estelle, 445 U.S. 263, 100
S.Ct. 1133, 63 L.Ed.2d 352.

Solem v. Helm, 33 Cr.L. 3220, June 28,
1983.

Code of Alabama, 1975, §13A-5-9(c)(3).

2. Whether the prior Federal conviction
of the accused was erroneously used to
enhance his punishment under the habitual
offender act.

Carter v. State, 420 So.2d 292
(Ala.Cr.App. 1982).

26 USC 5861 (d)

App-3

Rule 6 (b)(3)(iv), Alabama Rules of
Criminal Procedure - Temporary Rules

3. Whether a remark made by the
prosecutor during the course of the trial
which incorrectly misstated the law of
Alabama was erroneous.

House v. State, 61 So.2d 457, 36 Ala.App.
550, cert. denied, 61 So.2d 458, 258 Ala.
196 (1952).

Wade v. State, 381 So.2d 1057
(Ala.Cr.App. 1980).

APPENDIX B

Section II of Appellant's (Petitioner's)
Argument in the Court of Criminal
Appeals of Alabama

Mr. Montgomery's second contention to this Court is that error resulted when the trial court used a prior Federal conviction to enhance his punishment under the habitual offender act.

The Federal conviction made the basis of this argument is a violation of 26 USC 5861 (d):

"It shall be unlawful for any person to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record."

Mr. Montgomery was convicted for possession of a 20 gauge single barrel shotgun which had not been so registered.

Rule 6 (b) (3) (iv) of the Alabama Rules of Criminal Procedure - Temporary Rules provides that:

"Any conviction in any jurisdiction including Alabama, shall be considered and determined to be a felony conviction if the conduct made the basis of that conviction constitutes a felony under Act 607, §130 (4), Acts of Alabama, 1977, p. 812 (§13A-1-2(4), Alabama Criminal Code, or would have constituted a felony under that section had the conduct taken place in Alabama on or after January 1, 1980."

It is the proposition of the appellant that the possession of a firearm which has not been registered in the National Firearms Registration and Transfer Record does not constitute a crime under Alabama law and therefore cannot be considered a prior felony for sentencing purposes.

In Carter v. State, 420 So.2d 292 (Ala.Cr.App. 1982), the defendant was sentenced under the habitual offender act

and one of the prior convictions presented to the sentencing court was a conviction under a two count Federal indictment charging in one count the possession of a check stolen out of the United States mail and in Count 2 of unlawfully uttering and publishing a forged endorsement on the back of a United States Treasury check.

In the opinion issued by this court it stated that a federal conviction could be considered under the Habitual Offender Act if there is a State "counterpart" for the crime. This court determined that there was no corresponding state law under which a person could be charged for possessing a check stolen from the United States mail and therefore a conviction based on such offense could not be used in habitual felony sentencing. The opinion went on to say that a conviction under count two could be used in state

court since it is equivalent to our offense of possession of a forged instrument.

In the case under consideration now there is no correlative law in Alabama providing for an offense as set out in 26 USC 5861(d), the Federal statute deals exclusively with compliance of a Federal act as such the Federal government has exclusive jurisdiction of this offense. A person could not be charged and lawfully convicted in the Alabama state courts for failing to register a firearm in the National Firearms Registration and Transfer Record.

Therefore the Federal case cannot properly be used as a felony conviction for the purpose of the habitual offender act. Using the Federal conviction as such invalidates the sentencing hearing and this case should be remanded for new hearing.

APPENDIX C

Excerpt from Appellant's (Petitioner's)
Petition for a Writ of Certiorari
in the Supreme Court of Alabama

Petitioner alleges as grounds for
the issuance of the Writ the following:

* * *

2. The second basis of the
petition is that the decision of the
Court of Criminal Appeals in upholding
the trial court's action's [sic] of
allowing a prior Federal conviction to be
used to enhance punishment under the
Habitual Offender Statute is in conflict
with a prior decision of that court
namely Carter v. State, 420 So.2d 292
(Ala.Cr. App. 1982). The court in
Carter, held that a Federal conviction
could not be used to enhance punishment
under the Habitual Offender Statute if
there is no correlative law in Alabama
providing for such an offense.